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HUMAN RIGHTS COMMITTEE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 40 OF THE COVENANT

Second periodic reports of States parties due in 1988

Addendum

AUSTRIA */

[20 July 1990]

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*/ For the initial report submitted by the Government of Austria, see CCPR/C/6/Add.7; for its consideration by the Committee, see CCPR/C/SR.412, SR.413, SR.416 and SR.417 and the Official Records of the General Assembly, Thirty-eighth session, Supplement No. 40 (A/38/40), paras. 178-219.

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Part I

GENERAL

I. HUMAN RIGHTS IN THE AUSTRIAN CONSTITUTIONAL SYSTEM

1. In 1920, when Austria adopted a Federal Constitution, legislators were unable, during the negotiations being conducted at the time, to agree on a new list of fundamental rights. It was therefore decided to incorporate the fundamental rights then in force into the new Constitution, namely:

(a) The Law of 17 October 1862 for the protection of personal liberty;

(b) The Law of 27 October 1862 for the protection of the home;

(c) The Basic Law of the State of 21 December 1867 concerning the general rights of citizens;

(d) The resolution of 30 October 1918 of the Provisional National Assembly.

2. These four Laws constitute the foundations of the human rights guaranteed by the Austrian Constitution. Under article 149, paragraph 1, of the Federal Constitution, these laws are an integral part of the Constitution of the Republic of Austria and, as before, are an integral part of the constitutional system currently in force.

3. As mentioned above, the Constituent National Assembly was unable in 1920 to reach agreement on a new list of fundamental rights, but some of these rights were incorporated into the Federal Constitution. This was the case, first of all, for the principle of equality before the law, set out in article 7, paragraphs 1 and 2, of the Federal Constitution:

> "1. All Federal citizens are equal before the law. Privileges based upon birth, sex, social position, class, or creed are abolished.
>
> "2. All public employees, including the members of the Federal army, are guaranteed the unrestricted exercise of their political rights."

4. Regarding education, regulations extended the principle of equality before the law to cover general access to schools. Article 14, paragraph 6, of the Federal Constitution states that "Public schools are open to all, without distinction as to birth, sex, race, class, language or creed under conditions set by the law. This provision is also applicable to kindergartens and student hostels and shelters."

5. The right to vote is proclaimed as a fundamental right in the Federal Constitution. Article 26, paragraph 1, subparagraph (1), states:

> "The Nationalrat shall be elected by the people of the Bund according to the principles of proportional representation and on the basis of equal, direct, secret and personal suffrage of the men and women who have completed their nineteenth year of age."

6. Regarding eligibility, article 26, paragraph 4, of the Federal Constitution reads:

> "Every qualified voter who is more than (twenty-one years) of age on the day of the elections shall be eligible for election".

7. The same principles apply to the election of the President of the Republic (art. 60, para. 1):

> "The Federal President shall be elected by the entire people of the Federal State according to the principles of direct and secret election".

8. As regards eligibility to stand for election to the office of President of the Republic, article 60, paragraph 3, of the Federal Constitution states that:

> "Only a person who is qualified to vote in the elections to the Nationalrat and who has passed the thirty-fifth year of age before the first of January of the year of the election may be elected Federal President. Members of ruling or former ruling families are not eligible."

9. The voting principles applicable to elections to the Nationalrat also apply to election to the Landtage governed by article 95, paragraph 1, of the Federal Constitution and to elections to the town councils, governed by article 117, paragraph 2, of the Federal Constitution.

10. The Federal Constitution states that all persons have a fundamental right to an equitable trial presided by a judge: "No person may be withheld from the judge assigned to him by law."

11. In this context, it should also be mentioned that a constitutional regulation authorizing recourse to courts of special jurisdiction for special cases has been abolished, and that such courts are not recognized by the Constitution at present in force.

12. The provisions in the Federal Constitution concerning fundamental rights also include article 85: "Capital punishment in ordinary procedure is abolished", and article 90, paragraph 1: "Hearings of proceedings in civil and criminal cases before the trial court shall be oral and public. Exception may be prescribed by law."

13. Finally, mention should be made of the provision contained in article 9 (a), paragraph 3, of the Federal Constitution, which implicitly guarantees male Austrian citizens the right to refuse to perform military service because of conscientious objection. This provision reads as follows:

> "All male Austrian citizens must perform military service. Conscientious objectors who are exempted from military service must perform alternative service, according to the modalities defined by law."

14. The Treaty of St. Germain, which for Austria put an end to the state of war after the First World War, contains provisions relating to the "protection of minorities" (part III, section V). Under article 149, paragraph 1, of the

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Federal Constitution, these provisions are also an integral part of the Austrian constitutional system so that they have the status of constitutional law even today.

15. Under a Federal Constitutional Law of 1964, the European Convention for the Protection of Human Rights and Fundamental Freedoms and several provisions of the 1955 Treaty of Vienna concerning fundamental rights acquired constitutional law status.

16. It may also be mentioned that the International Convention on the Elimination of All Forms of Racial Discrimination was ratified by the Federal Constitutional Law of 3 July 1973. Article 1 of that Law states that:

> "1. Any form of racial discrimination - also if not already conflicting with article 7 of the Federal Constitution, as revised in 1929, and with article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms - shall be prohibited. The legislative and executive powers shall refrain from any discrimination on the sole ground of race, colour, descent or national or ethnic origin.
>
> "2. Notwithstanding paragraph 1, particular rights may be granted to or particular obligations imposed upon Austrian nationals, in so far as this does not conflict with article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms."

17. In short, it might be said that the Austrian constitutional system guarantees respect for human rights essentially through the 1867 Basic Law of the State concerning the general rights of citizens and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

18. The fundamental rights thus guaranteed therefore have the status of directly applicable law, which is binding on both the legislature, the executive and court practice.

19. Fundamental rights should be regarded primarily as civil liberties which protect all citizens against illegal interference by the authorities. Fundamental rights must also be respected by public servants and by the courts when applying the laws. Whenever the laws to be applied by public servants or the courts need to be interpreted, this must be done with full respect for fundamental rights. It is a generally-accepted principle that all legal provisions must be interpreted in a manner not incompatible with fundamental rights.

II. PROTECTION OF FUNDAMENTAL RIGHTS

A. At the national level

20. Fundamental rights are an integral part of the constitutional system currently in force and therefore enjoy a special guarantee of continuity based on that system. Under article 44 of the Federal Constitution, changes in fundamental rights (including changes in the Federal Constitution) may be enacted by the Nationalrat only in the presence of at least one half of its members and by a majority of two thirds of votes cast. Amendments to fundamental rights must also be submitted to a referendum on demand of one third of the members of the Nationalrat or of the Bundesrat.

21. Article 18, paragraph 1, of the Federal Constitution establishes the legal nature of the public administration as follows: "The entire public administration shall be carried on only on the basis of the laws."

22. As a result of this principle of the legality of the administration, administrative acts derive not only from laws in general, but also from fundamental rights in particular. The same applies to the courts.

1. Appeals against administrative decisions

23. Any person who is the subject of an administrative decision is entitled to apply to have that decision nullified by a higher administrative authority on the ground that it was at variance with a fundamental right. The higher administrative authority is authorized to repeal or modify a disputed decision taken by a subordinate authority, i.e. to take a new decision concerning the act at issue. Procedural law in this respect is based on the principle that an application to nullify an administrative decision has a suspensive effect. Thus the disputed decision should not be carried out.

24. A decision taken in final instance by an administrative authority can be appealed before the Constitutional Court. One of the grounds justifying this appeal could be that the decision allegedly violates fundamental rights. The constitutional basis for such an appeal to the Constitutional Court is set forth in article 144, paragraph 1, of the Federal Constitution, which states:

> "The Constitutional Court shall hear appeals against decisions of the administrative authorities in so far as the appellant claims that the decision in question violates a right guaranteed him by constitutional law or that his rights have been violated by the application of an illegal decree, an unconstitutional law or a treaty not in conformity with the law. Under the same conditions the Constitutional Court shall hear appeals against the use of direct means of administrative coercion against the person. The appeal may be made only after exhaustion of administrative remedies if the case is against administrative authorites."

25. Appeals may be lodged with the Constitutional Court in either of the following cases:

(a) Against the decision by an administrative authority;

(b) Against the use of direct means of administrative coercion. Acts such as arrests and searches may be considered to be direct means of coercion.

26. In both of these cases the appeal lodged with the Constitutional Court may be justified on either of the following grounds:

(a) That the administrative decision is at variance with a fundamental right and thus constitutes illegal interference threatening the appellant's fundamental rights; or

(b) That the appellant's rights have been violated by an administrative act because the act is based on an illegal decree, an unconstitutional law or a treaty not in conformity with the law, for which reason the act is based on a rule of law that violates fundamental rights.

27. If the Constitutional Court is of the opinion that an administrative decision is at variance with one of the appellant's fundamental rights, the decision will be nullified. The administrative authority that had taken the impugned and now nullified decision has to take a new decision in accordance with the legal concept defended by the Constitutional Court. The new decision may again be appealed.

28. If the Constitutional Court is of the opinion that the appellant's fundamental rights have been threatened by direct means of administrative coercion, the measure will also be nullified unless it is still producing effects (for example, an object is still confiscated at that time); if this is not the case, the Constitutional Court will rule that the measure is illegal. This last fact is of crucial importance in any application for damages, since thereby the Constitutional Court has rule with binding effect on the illegality of the measure in question. The appellant's entitlement to damages depends on whether it can be proved that the law was violated in error or not.

29. In cases where an administrative act has been shown to be unconstitutional because the decree on which the act was based itself violated a fundamental right, the Constitutional Court is required to verify the cogency of the argument. If the Constitutional Court is of the opinion that the decree in question is indeed at variance with fundamental rights, it will nullify the decree and must examine the impugned administrative decision in the light of the legal situation, the nullified decree no longer being relevant. In general this implies that the impugned decision will be nullified.

30. The following statistical table provides information on the Constitutional Court's monitoring function with respect to administrative decisions.

Year	Appeals pending	Appeals settled	Appeals granted
1985	957	1 375	179
1986	1 295	1 351	176
1987	1 454	1 440	329
1988	1 974	2 048	702

2. Monitoring of laws and decrees

31. The Constitutional Court is also competent to ascertain the constitutionality of laws and the legality of decrees. This competence involves monitoring Federal and Land decrees and all regulations regardless of the issuing authority for compatibility with fundamental rights.

32. Article 140, paragraph 1, of the Federal Constitution establishes the competence of the Constitutional Court with regard to the monitoring of laws, as follows:

> "The Constitutional Court shall render judgement on the unconstitutionality of a Federal or Land law on the application of the Administrative Court, the Supreme Court or a court of second instance, or, in the case of a law to be applied in a case before the Constitutional Court itself, ex officio. It shall rule on the

unconstitutionality of Land laws on the application of the Federal Government and on the unconstitutionality of federal laws on the application of a Land Government or of one third of the members of the National Council. The constitutions of the Länder may provide that the constitutionality of Land laws may also be determined on the application of one third of the members of the Land diets. The Constitutional Court shall also rule on the unconstitutionality of laws on the application of any individual whose rights have been violated by the laws in question, provided that such laws have been made applicable to him without a court decision or prior notification. Article 89, paragraph (3), shall apply by analogy to the above-mentioned applications."

33. The Constitutional Court is empowered to ascertain the constitutionality of Federal and Land laws and thus their compatibility with established fundamental rights. There are three types of case in which such constitutionality proceedings may be instituted:

(a) Proceedings on the constitutionality of laws may be instituted by the Administrative Court, the Supreme Court or a court of second instance. Where one of the above mentioned courts has to apply a federal or Land law in rendering a specific judgement and where the law is suspected of being unconstitutional by virtue of the fact that it conflicts with a fundamental right, the court in question must apply to the Constitutional Court for an examination of the law in question. The same is true for the Constitutional Court itself. If it expresses reservations regarding the constitutionality of a law to be applied to a juridical event, it must institute proceedings for the examination of that law. This requirement is based on the principle whereby no court may be compelled to apply a federal or Land law whose constitutionality is in doubt;

(b) The Federal Government may request the Constitutional Court to institute proceedings to ascertain the constitutionality of Land laws. Similarly, Land governments may apply to the Constitutional Court for a ruling on the constitutionality of Federal laws. This right may also be exercised by one third of the members of the National and Federal Councils;

(c) Finally, any individual may apply to the Constitutional Court for a ruling on the constitutionality of Federal or Land laws, provided that:

(i) The individual making the application can claim that his rights have been directly infringed by an unconstitutional law, and that

(ii) Such laws were made applicable to him without any judicial or administrative decision.

34. The Federal laws examined by the Constitutional Court are supported by the Federal Government. Land laws examined by the Constitutional Court are supported by the government of the Land whose diet promulgated the law in question.

35. In most cases, proceedings for the examination of a law are instituted by the Constitutional Court because the Constitutional Court itself or another court (see para. 33 (a) above) is obliged, in the course of proceedings, to

apply a specific part of a law thought to be unconstitutional. Consideration is given only to that part of the law pertinenet to the judgement to be made in other proceedings.

36. If the Constitutional Court is of the view that the part of the law under consideration is unconstitutional because, for example, it is incompatible with a fundamental right, it nullifies that part of the law. In general, this annulment is accompanied by a time-limit. The Constitutional Court rules that the part of the law contrary to the Constitution will be nullified after a period of six months or one year has elapsed. This constitutional provision is designed to avoid legal vacuums and to allow legislators time to deal with the question in accordance with the Constitution. In cases pending before the Constitutional Court or another court, decisions must nevertheless be taken in such a way that the part of the law to be nullified is no longer part of the legislation to be applied at the time when the decision is made. This procedure ensures that a court which has challenged the constitutionality of a legal provision does not apply that provision in its ruling, if the Constitutional Court has found the provision in question to be unconstitutional.

37. A ruling by the Constitutional Court nullifying a Federal or Land law obligates the Federal Chancellor or the Governor of the Land in question to publish the nullification in the Federal or Land official journal.

38. When a specific part of a law is annulled by a decision of the Constitutional Court on grounds of unconstitutionality, all courts and administrative authorities are bound by that ruling. The legislature must agree on a new legal provision conforming to the legal concept of the Constitutional Court within a period fixed by the Court.

39. The above observations regarding the Constitutional Court's monitoring role with regard to laws also apply by analogy to the Court's monitoring role with regard to decrees. These are general regulations issued by the Federal or Land administrative authorities. However, the Court's monitoring of decrees is broader, extending not only to their constitutionality, but also to their legality.

40. With regard to the authorities able to apply to the Constitutional Court for a ruling on a decree, the conditions applying are essentially the same as for the institution of proceedings for consideration of a law by the Constitutional Court. However, any court may request the Constitutional Court to rule on a decree thought to be unconstitutional or illegal.

41. If a decree is found to be unconstitutional or illegal, it will be nullified by the Constitutional Court.

42. The Constitutional Court's role in monitoring the legality and constitutionality of decrees, as well as the constitutionality of laws has expanded significantly, as the following table shows:

Proceedings involving consideration of decrees

Year	Proceedings pending	Annulments
1985	145	30
1986	128	51
1987	192	80
1988	260	148

Proceedings involving consideration of laws

Year	Proceedings pending	Annulments
1985	349	131
1986	316	168
1987	358	135
1988	320	160

3. The courts

43. In both civil and criminal matters, the ordinary courts must also observe fundamental rights.

44. Court measures or decisions resulting in violations of fundamental rights may be challenged through the appeal procedure. Furthermore, courts may ask the Constitutional Court for a ruling on the constitutionality of legal provisions which they must apply in reaching a judgement. Any court doubting the constitutionality of a legal provision which it must apply is obligated to take the necessary steps to institute proceedings before the Constitutional Court to ascertain the constitutionality of the provision in question. The parties to court proceedings may also challenge the constitutionality of a legal provision in force. If the court accepts their arguments, it must take the necessary measures to have the provision examined by the Constitutional Court.

45. If the Constitutional Court shares the view of the court hearing the case and therefore nullifies the disputed legal provision, the lower court must rule on the case before it on the basis that the provision in question no longer has any legal force. This procedure ensures that the court's final decision is not based on a legal provision whose constitutionality is in doubt. However, the court is bound by the final ruling of the Constitutional Court, even when the Court does not share the objections entered by it and declares the provision challenged to be entirely consistent with the Constitution.

B. At the international level

46. In Austria, fundamental rights are not only protected at the national level, but are also guaranteed by a monitoring system at the international level. This international system for the protection of fundamental rights takes various forms.

1. European Convention for the Protection of Human Rights and Fundamental Freedoms

47. In 1958, the Republic of Austria ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms. In 1964, the European Convention as a whole was promulgated nationally as constitutional law, to be directly applicable. The European Convention for the Protection of Human Rights and Fundamental Freedoms also guarantees rights which must be observed by all national administrative authorities and courts, and which are also covered by the national system for the protection of fundamental rights, as are the other rights guaranteed by the Constitution.

48. The protection of fundamental rights guaranteed by the European Convention has been strengthened in that the Republic of Austria has recognized the jurisdiction not only of the European Commission of Human Rights, but also of the European Court of Human Rights.

49. Any person claiming that rights recognized by the European Convention have been violated by an Austrian authority is entitled to apply to the European Commission of Human Rights for a ruling on the legal act in question and thus avail himself of the assistance of the bodies responsible for providing legal protection under that Convention.

2. Optional Protocol to the International Covenant on Civil and Political Rights

50. In 1987, the Republic of Austria also ratified the Optional Protocol to the International Covenant on Civil and Political Rights. The following reservation was made:

> "The Republic of Austria ratifies the Optional Protocol to the International Covenant on Civil and Political Rights on the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission of Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

51. In ratifying the Optional Protocol, the Republic of Austria also recognized the competence of the Committee established under article 28 of the International Covenant on Civil and Political Rights to decide on communications received under the Protocol

3. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

52. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force in the Republic of Austria on 28 August 1987. Under article 22, paragraph 1, of the Convention, the Republic of Austria recognized the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to Austrian jurisdiction who claim to be victims of a violation of the provisions of the Convention.

4. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

53. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment entered into force in the Republic of Austria on 1 May 1989. The Convention provides for the establishment of a Committee to determine, by organizing visits any place where individuals are deprived of their liberty by a public authority, whether the conditions to which detainees are subjected actually fulfil the requirements of the Convention, article 7 et seq. The main effect of the Convention is the establishment of a Committee authorized to investigate the treatment of individuals deprived of their liberty with a view to affording them, where necessary, greater protection against torture and inhuman or degrading treatment or punishment. In order to carry out its functions, the Committee is authorized by each State Party to visit any place subject to its jurisdiction and, where necessary, to submit proposals for improvements. That authorization can be restricted only in exceptional circumstances - for reasons of national defence or public safety, for example. Otherwise, any visit may be made, after prior notification, at any time and to any place. The Parties are obligated to co-operate with the Committee.

54. The members of the Committee visiting a Party may also interview in private persons deprived of their liberty and communicate their complaints to the competent authorities.

Part II

OBSERVATIONS ON INDIVIDUAL ARTICLES

The right to self-determination (article 1)

55. The Republic of Austria was founded after the First World War on the basis of the right of peoples to self-determination. The newly-established Republic claimed that right while at the same time recognizing that it was a right of peoples who had founded new States following the collapse of the Austro-Hungarian monarchy.

56. The Declaration of Independence of 27 April 1945 was also based on the principles of the right of peoples to self-determination, although it contains no specific reference to it. Article 1 of the Declaration states that: "The Democratic Republic of Austria is re-established and must be instituted in the spirit of the Constitution of 1920". Article 2 of the Declaration declares null and void the incorporation into the German Reich imposed by force on the Austrian people.

57. The State Treaty for the Re-establishment of an Independent and Democratic Austria of 15 May 1955 is also based on the principles of the right of peoples to self-determination. In article 1 of the Treaty, the Allied and Associated Powers recognize the re-establishment of Austria as a sovereign, independent and democratic State. In article 2 of the Treaty, they also declare their intention of respecting the independence and territorial integrity of Austria as established by the Treaty.

58. In pursuance of self-determination, the Federal Constitutional Law concerning the Neutrality of Austria was enacted on 26 October 1955, stipulating that:

> "1. For the purpose of the lasting maintenance of her independence externally, and for the purpose of the inviolability of her territory, Austria declares of her own free will her perpetual neutrality. Austria will maintain and defend this with all means at her disposal.
>
> "2. For the securing of this purpose in all future times, Austria will not join any military alliances and will not permit the establishment of any foreign military bases on her territory."

Guarantee of the rights proclaimed in the Covenant (article 2)

59. Austrian law guarantees all persons within Austrian territory, without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, all the fundamental rights embodied in the International Covenant on Civil and Political Rights.

60. Article 1, paragraph 1 of the Federal Constitutional Act passed on 3 July 1973 with a view to implementing the provisions of the International Convention on the Elimination of all Forms of Racial Discrimination stipulates:

"Any form of racial discrimination ... shall be prohibited. The legislative and executive powers shall refrain from any discrimination on the sole ground of race, colour, descent or national or ethnic origin."

61. Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, also prohibits any form of discrimination.

62. Further information regarding the protection of fundamental rights guaranteed by the International Covenant on Civil and Political Rights, may be found in part I of this report.

Equal rights of men and women (article 3)

63. In implementing the civil and political rights proclaimed in the International Covenant on Civil and Political Rights, equal rights for men and women are guaranteed.

64. Austrian law goes beyond these obligations. Article 7, paragraph 1, of the Federal Constitution reaffirms the general principle of equality: "All Federal citizens are equal before the law. Privileges of birth, sex, position, class and creed are excluded".

65. In this connection, one specific consequence of the general principle of equality is equal and general access to all spheres of public service. Article 3 of the fundamental law of the State of 1867 states:

"Civil service posts shall be equally accessible to all Austrian citizens."

66. Austria has also ratified the Convention on the Political Rights of Women and the Convention on the Elimination of All Forms of Discrimination against Women.

67. It should be noted that, on 30 October 1918, in order to remedy the situation that had prevailed until then, the Provisional National Assembly passed an act guaranteeing all persons complete freedom of association and assembly without any distinction being drawn between the sexes. The right of women to vote was also introduced at that time.

68. Article 14, paragraph 6, of the Federal Constitution also stipulates that public schools are open to all without distinction as to sex.

Suspension of fundamental rights (article 4)

69. Austria has not applied article 4. It is pointed out that Austrian constitutional law does not contemplate the suspension of fundamental rights.

The right to life (article 6)

70. The right to life was established for the first time in article 63 of the State Treaty of St. Germain:

"Austria undertakes to assure full and complete protection of life and liberty to all inhabitants of Austria without distinction of birth, nationality, language, race or religion."

71. The Federal Constitution of 1920 confers the status of constitutional law on the Treaty of St. Germain. Since that time, the right to life has been embodied in the Austrian Constitution.

72. Austria honours its obligation to protect the right to life in particular by making any threat to life a punishable offence. Consequently, the Austrian Criminal Code contains provisions concerning punishable acts directed against physical integrity and life (paras. 75 et seq.). Article 75 of the Criminal Code states that murder is a punishable act:

> "Any person killing another person shall be liable to imprisonment for 10 to 20 years or imprisonment for life."

73. Homicide, homicide at the request of the victim, participation in a suicide, negligant homicide and endangering an individual's life are also punishable by imprisonment. The infliction of bodily injury, abandonment of an injured person or failure to provide assistance to a person in danger are also punishable offences.

74. In addition to the provisions of criminal law, other legal norms exist for the legal protection of life, such as the provisions for the protection of workers designed to ensure safety in the workplace. Further provisions are intended to ensure safety by preventing avoidable accidents caused by potentially dangerous machinery, apparatus and equipment. There are also special provisions for the protection of human life which govern the sale of toxic, chemical or similar substances.

75. One specific problem concerns the protection of the life of the unborn child. Article 96 of the Criminal Code makes it an offence to terminate a pregnancy with the consent of the pregnant woman, while article 98 of the Criminal Code prohibits the termination of pregnancy without the consent of the pregnant woman. The circumstances in which the termination of pregnancy is not considered a punishable offence are specified in article 97 of the Criminal Code:

> "(1) The act shall not be punishable under article 96:
>
> 1. If the pregnancy is terminated by a medical practitioner within three months of the start of pregnancy and following consultation with a doctor; or
>
> 2. If the termination of pregnancy is necessary to avert a serious and otherwise unavoidable risk to the life of the pregnant woman or serious damage to her physical or mental health, or if there is a serious risk that the child will suffer major mental or physical injuries, or if the pregnant woman was a minor at the time of conception and, in all these cases, provided that the termination is performed by a medical practitioner; or
>
> 3. If pregnancy is terminated to save the pregnant woman from a direct and otherwise unavoidable danger to her life and in circumstances where the help of a medical practitioner cannot be obtained in time.

(2) No medical practitioner shall be obliged to terminate a pregnancy or assist in such termination unless it is made immediately necessary by an imminent and otherwise unavoidable threat to the life of the pregnant woman. This provision shall also apply to persons engaged in providing specialized, medico-technical or auxiliary health services.

(3) No person shall be penalized in any way whatsoever for having performed a non-punishable termination of pregnancy or having assisted therein, or for having refused to perform such a termination or to assist therein."

76. The provision whereby a termination of pregnancy performed by a medical practitioner in the first three months following the start of pregnancy and after consultation with a doctor was challenged as incompatible with the right to life. In its decision No. 7400 of 11 October 1974, the Constitutional Court ruled that it was compatible with that right and provided the following explanation in support of its interpretation:

"Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms contains no definition of life as protected by it and there is no rule stipulating the time at which such life commences. The Convention is concerned with 'human rights and fundamental freedoms' as described therein and proclaimed in its preamble. Everyone's right to life as guaranteed under article 2 of the Convention can therefore relate only to the personal life of an individual. The definition of a person protected under article 2 of the Convention does not depend on the definition established under a national legal system. A person having the right to life under article 2 of the Convention retains that right even if, under the national legal system of one of the signatory States, his legal status is not recognized or only partially recognized. Otherwise, the protection of the right to life embodied in the Convention could be annulled by any signatory State by withdrawal of the legal status of a holder of the right proclaimed in article 2 of the Convention. Conversely, the fact that full or partial legal status is recognized by a given national legal system does not necessarily mean that such recognition bears a causal relationship to the protection afforded under article 2 of the Convention.

"The first sentence of article 2, paragraph 1, of the Convention ('Everyone's right to life shall be protected by law') does not stipulate whether the protection in question refers not only to the life of a person already born, but also to the life of a foetus.

"There is nothing in the wording of article 2 as a whole or in its context to suggest that the provision also applies to the life of a foetus.

"Exceptions to the protection of the right to life are provided for in the first sentence of article 2, paragraph 1, as far as causing the death of a person already born is concerned (art. 2, para. 1, second sentence and para. 2, and art. 15, para. 2). If the first sentence of article 2, paragraph 1, also referred to the protection of the life of a foetus, such protection would be unconditional. But it would be difficult to understand why, in setting out rules governing the right to life in special circumstances, the Convention would have authorized deprivation

of life of persons already born while excluding any harm done to a foetus, even in cases where special considerations apply. Consequently, the wording of this provision leads to the conclusion that article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not extend to protection of the life of a foetus.

"If the provision in article 2 has no bearing on the life of a foetus, the non-punishable nature of the termination of pregnancy referred to in article 97, paragraph (1) 1 of the Criminal Code does not constitute an infringement of article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms ...".

77. In conclusion, it should be noted that, under the terms of article 85 of the Federal Constitution, capital punishment has been abolished in Austria. Austria has also ratified Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, under which the death penalty is also abolished.

Prohibition of torture and inhuman or degrading treatment (article 7)

78. Austria abolished torture in 1776.

79. The prohibition of torture and inhuman or degrading treatment is embodied in article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is thus guaranteed by constitutional law. On 10 December 1984, Austria also ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations General Assembly resolution 39/46 of 10 December 1984). In accordance with article 22, paragraph 1, of that Convention, Austria has recognized the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation of the provisions of the Convention.

80. Austria has also ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Under the terms of that Convention, a Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was set up with the authority to visit any place in which persons are deprived of their liberty. As stated in the preamble to the Convention, that provision is intended to strengthen the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment by non-judicial means of a preventive character based on visits.

81. In the area of criminal procedure, article 202 of the Code of Criminal Procedure which prohibits certain methods of interrogation, also contains a prohibition against the use of torture:

"The use of promises, threats or methods of constraint in order to induce a suspect to confess guilt or to make other specific statements shall be prohibited. In addition, the preliminary investigation must not be delayed by attempts to obtain a confession."

82. With regard to the arrest and production of persons by the police or gendarmerie authorities, article 36, paragraph 2, of the Administrative Criminal Act states that "The person and dignity of an accused shall be treated with the greatest possible respect".

83. With regard to the treatment of accused persons, article 22, paragraph 1, of the Prisons Act stipulates: "Prisoners shall be dealt with calmly, seriously and firmly, in accordance with the law and with due respect for their dignity and honour".

84. Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that: "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made". The prohibition of the use of such evidence became an integral part of the Austrian Prisons Act when Austria declared that it regarded that provision "as the legal basis for the inadmissibility ... of invoking any statement which is established to have been made as a result of torture".

85. Under article 18 of the Prison Code, prison commissions have been set up to ascertain whether detainees are treated properly and in accordance with the law. Such commissions exist in each Land. The relevant provisions read as follows:

"1. A commission shall be set up at the headquarters of every Land court dealing with prison affairs to ensure strict compliance with the requirements of prison administration.

"2. Each commission shall consist of seven reliable persons, who shall elect a chairman and vice-chairman from among their number each year.

"3. Reliable persons shall be considered to be only those entitled to act as jurors or magistrates. The Federal Minister of Justice shall, on the proposal of the Federal Minister of Commerce, Industry and Social Administration, appoint four reliable persons, at least two of whom shall hold no public office and at least one of whom shall be a woman; one of the reliable persons appointed shall hold an administrative position in the Federal Ministry of Justice. In appointing reliable persons, particular consideration shall be given to those who appear to understand what is involved in serving a prison sentence. The members of commissions shall serve for a term of five years.

"4. A commission may perform its functions only when its chairman and at least three other members are present.

"5. Commissions shall make annual unannounced visits to the prison establishments in the Land where they have their headquarters. They may also conduct other visits as they see fit, in addition to the compulsory visit. On request, prisons shall provide commissions with any information they require regarding detainees and allow them to consult any files on the enforcement of sentences.

"6. During the first quarter of the year commissions shall submit reports on their activities to the Federal Ministry of Justice and make any observations they deem necessary."

86. Acts of torture are punishable. Acts of torture include murder, striking and wounding resulting in death, negligent homicide, serious bodily injury, serious bodily injury with lasting serious consequences, bodily injury resulting in death, or bodily injury inflicted by negligence, etc. Mention should also be made in this context of the constituent elements of the offence defined in article 312 of the Criminal Code (cruel or negligent treatment of a detainee):

"1. Any official who inflicts physical or mental suffering on a detainee or any other person held in custody on the order of an administrative authority, a person under his authority or a person to whom he has access in the performance of his duties shall be liable to imprisonment for up to two years.

"2. Any official who seriously neglects his duty to assist or care for a person in the situation above and thus, if only through negligence, seriously impairs that person's health or physical or mental development shall be liable to the same penalties.

"3. If the act results in serious physical injury (art. 84, para. (1)), the offender shall be liable to imprisonment for up to three years; if it results in physical injury with serious permanent consequences (art. 85), the offender shall be liable to imprisonment for up to five years; if it results in the death of the injured person, the offender shall be liable to imprisonment for up to 10 years."

87. In its decisions, the Constitutional Court has applied the principle that the use of moderate force consistent with the principle of proportionality by the police and gendarmerie authorities in no way constitutes inhuman or degrading treatment. To give just one example, the Court has ruled that handcuffs should be used in cases where suspects resist arrest. However, if a suspect is handcuffed without showing any sign of such resistance, such treatment is deemed unconstitutional and degrading. The Constitutional Court applies the same principles to the use of physical force. The Court cites case No. 8146/77 as an example, explaining that the act of pulling someone violently by the hair when he is already held by several police officers after resisting arrest is not considered as moderate force, but as gross negligence injurious to the dignity of the person concerned and constituting degrading treatment. In another case (8580/79), the plaintiff refused to remove himself from a stairway. One of the police officers present pulled him by the hair, forcing him to get up. The Constitutional Court ruled that this act did not constitute degrading treatment, since the stairway was narrow and did not allow any other form of physical force, such as lifting the plaintiff bodily, to be used.

88. In case No. 8126/77, the Constitutional Court, in making its ruling, stated among other things "not only the confinement itself, but also the methods used in carrying out the confinement give grounds for appeal to the Constitutional Court". The Court found that the poor condition of the cell in which the plaintiff was confined was a violation of the right to be treated in a way which was neither inhuman nor degrading.

89. With regard to the right of extradition, article 19 of the Extradition and Judicial Co-operation Act stipulates that extradition shall not be effected in cases where there is reason to believe that the criminal procedure to be applied or the penalty imposed would run counter to the prohibition of inhuman or degrading treatment.

Prohibition of slavery and forced labour (article 8)

90. Article 16 of the Austrian General Civil Code of 1 June 1811 states that:

> "Every human being has inborn rights, which are apparent from reason, and is accordingly to be regarded as an individual. Slavery or bondage and the exercise of power based thereon are forbidden."

91. The first sentence of article 7 of the Basic Law of the State states:

> "Every condition of bondage and serfdom is abolished forever."

92. Austria has also ratified the Slavery Convention of 25 September 1926, as well as the international instruments relating to that Convention.

93. Slave trading is punishable as a violation of the right to liberty under article 104 of the Criminal Code, which states:

> "1. Anyone engaging in slave trading shall be liable to imprisonment for five to ten years.
>
> "2. Anyone whose conduct causes a person to be reduced to slavery or to a situation similar to slavery or causes a person to give himself up to slavery or a situation similar to slavery shall be liable to the same penalty."

94. Slavery and forced labour are also prohibited under article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Austria has also ratified the International Labour Organisation's conventions on forced labour, namely, Convention (No. 29) concerning Forced Labour, of 28 June 1930, and Convention (No. 105) concerning the Abolition of Forced Labour, of 25 June 1957.

95. Forced labour is also precluded by virtue of the constitutional guarantee of free choice of occupation and occupational training contained in article 18 of the Basic Law of the State of 1867:

> "Every person shall be free to choose his occupation and to train himself for it as and where he sees fit."

The right to personal freedom (article 9)

96. The present constitutional basis for protecting the freedom of the individual is the Act of 27 October 1862 for the protection of personal freedom. Article 1 of the Act states:

> "No person may be withheld from the judge assigned to him by law."

97. With regard to arrest, article 2 states:

> "No person may be arrested except by virtue of a substantial judicial order.
>
> "The order must be served on the person arrested at the time of the arrest or within 24 hours of the arrest."

98. The practice of the Constitutional Court has established that the Act for the protection of personal freedom is not designed to protect the individual against any form of restriction of freedom of action, but rather to prevent arbitrary arrest. The term arrest should be understood as a prohibition of any movement by an individual by means of an administrative act or physical force, or as confinement to specific places and areas which the person in question may not leave.

99. Article 4 of the Act for the protection of personal freedom states:

> "The organs of the public power authorized to make arrests may take a person into custody in the circumstances prescribed by law, but must either release the person within 24 hours or bring him before the competent authority.
>
> "The competent authority is understood to be the authority legally responsible for further proceedings with regard to the person taken into custody in the particular case."

100. The legal grounds set out above lead to the following conclusions:

(a) Deprivation of liberty may be ordered and effected only by a competent authority and must be legally substantiated. This follows from the right to proceedings before a judge of law;

(b) In principle a person may be arrested only on the basis of a substantiated arrest warrant. Unless special regulations providing for lawful arrest even in the absence of an arrest warrant are in force, the arrest warrant or provisional detention warrant must be issued prior to the arrest, since without them the arrest cannot be made. Failure to issue the warrant prior to the arrest may not be corrected by a subsequent order or by issuing a warrant within 24 hours of the arrest. Similarly, the grounds for the arrest cannot be changed subsequently nor can any legal grounds other than those that led to the arrest be invoked if it becomes clear that they no longer exist;

(c) Under article 4 of the Act for the protection of personal freedom a person may be arrested without a warrant. The administrative bodies authorized to arrest a person and the grounds on which an arrest may be made are specified in the relevant legal regulations.

101. An arrest warrant may be issued on the following grounds, pursuant to article 175 of the Code of Criminal Procedure:

> "1. If the suspect is caught <u>inflagrante delicto</u> or charged with a crime or offence immediately after it has been committed, or is found in possession of weapons or other objects connected with crimes or offences or suggesting that he has participated in such crimes or offences;

"2. If he has fled or made preparations to flee or is in hiding, or if there is a substantiated risk that he may flee or go into hiding on account of the severity of the sentence he faces;

"3. If he has attempted to influence witnesses, experts or accomplices, to destroy evidence or otherwise sought to make the discovery of the truth more difficult, or if there are substantiated grounds for suspecting that he may do so; and

"4. If there are specific reasons for believing that he may try to repeat or complete the crime or offence."

102. Arrest warrants may be issued only by examining magistrates. Public servants are not authorized by law to issue such warrants.

103. Arrest of a suspect is the responsibility of the State's law-enforcement bodies, and above all of the police and gendarmerie.

104. If the act is a punishable act falling within the jurisdiction of the courts, members of the police and gendarmerie are empowered to arrest an individual without a warrant in the circumstances specified in paragraph 101.1 above; in no other cases may they do so unless there is an immediate danger.

105. In the case of offences punishable by the administrative authorities rather than by the courts, an individual may be arrested by the police or gendarmerie in order to be brought before the administrative authorities only if he has been caught inflagrante delicto and provided:

(a) He is unknown to the body by which he was arrested and is unable to identify himself on the spot by means of identity documents or,

(b) There is good reason to believe that he will try to evade criminal prosecution or,

(c) In spite of warnings he continues his punishable act or attempts to repeat it.

106. Moreover, article 36 of the Administrative Criminal Code stipulates:

"1. Every arrested person must be turned over without delay to the nearest authority competent in the case, or be released if the grounds for arrest have already ceased to exist. The person shall be informed, if possible at the time of his arrest and in a language he is able to understand, of the reasons for his arrest and the charges held against him. The authority must examine the person taken into custody immediately or within 24 hours of the arrest. A person may not be remanded in custody for more than 48 hours after the beginning of the examination for purposes of administrative criminal proceedings.

"2. Pre-trial detention and appearance before the authorities must take place with the greatest possible consideration for the person and reputation of the person arrested ... .

"3. The person under arrest must be allowed to contact, without undue delay, a member of his family or any other person in whom he has confidence, or a legal counsel; he must be informed of this right. If there are objections to the arrested person himself contacting the above, the administrative penal authorities shall do so.

"4. Arrested persons who face criminal administrative proceedings are entitled to visits by members of their family, by their legal counsel or by the diplomatic or consular representatives of their country of origin. Article 53 (c), paragraphs 3 to 5 apply by analogy to correspondence and visits."

107. In all cases, any person arrested for an offence that is not punishable by the courts must be released after 48 hours.

108. Regardless whether a person suspected of having committed an act punishable by a court has been arrested under a judicial arrest warrant or not, he must be brought before a judge. Article 177, paragraph 2 of the Code of Criminal Procedure states:

"Any person remanded in custody must be questioned by the judge or the police authorities concerning the grounds and reasons for his custody, and if there appears to be no reason for holding him in custody, he shall be released immediately; failing this, he must be brought before the examining magistrate within 48 hours."

109. If the person arrested is still suspected of the offence after questioning and if the reasons for holding him in custody remain valid, he may be kept in custody by decision of the judge.

110. Article 179, paragraph 1 of the Code of Criminal Procedure states the following with regard to questioning by the examining magistrate:

"Any person who has been arrested or for whom an arrest warrant has been issued by an examining magistrate must be questioned by that magistrate within 24 hours. If this is not possible, the person may nevertheless be detained in custody, although he must be questioned within three days at the latest, and the reasons for the delay given in the record."

111. The examining magistrate must decide immediately after the questioning whether the accused should be released or whether a detention warrant should be issued. In the latter case the accused has the right to petition the judge in chambers. Article 194, paragraph 2, of the Code of Criminal Procedure, states that a decision must be taken immediately on appeals made against detention warrants issued by examining magistrates, on the basis of the procedure for the review of the custody order. Under this procedure a decision must be taken either to release the accused on bail, to extend the validity of the detention warrant or possibly to order his release subject to certain restrictions. The restrictions in question are covered by article 180, paragraph 5 of the Code of Criminal Procedure and include, for example, suspension of the driving licence or payment of security.

112. The custody must be reviewed either if the person in respect of whom a detention warrant has been issued appeals, or automatically every two months, in accordance with article 194, paragraph 3, of the Code of Criminal Procedure:

> "A review must be carried out as a matter of course if such procedure is not mandatory under paragraph 2, and if the custody has lasted for a period of two months without any such procedure having been initiated. The accused may refuse automatic review once he has selected his counsel."

113. These reviews are discontinued once the accused has been duly charged or committed for trial.

114. Reviews take place in camera. Only the government procurator, the accused and his counsel, together with the examining magistrate, are present. After hearing the explanations of all concerned, the judges in chambers rule whether the validity of the detention warrant should be extended; the ruling must be announced orally by the president. Both the government procurator and the accused may appeal to the higher court. The appeal must be made within 15 days.

115. The higher court must reach a decision on the appeal without delay, at a closed hearing.

116. Article 8 of the 1867 Basic Law of the State reads as follows:

> "The State shall be required to pay damages to the injured party for any detention unlawfully ordered or extended."

117. Wilful infringement of the provisions governing the protection of personal freedom by a public servant is considered an abuse of authority and thus constitutes a punishable act, pursuant to article 302, paragraph 1, of the Criminal Code;

> "Any official who knowingly abuses his authority to perform official acts in the enforcement of the law, on behalf of the Federation, a Land, a group of communes, a commune, or any other public legal entity, with the intention of infringing the rights of another person, shall be punished by between 6 months' and 5 years' imprisonment."

118. An offence committed by negligence against individual freedoms or owner's rights constitutes a punishable act under article 303 of the Criminal Code, which states:

> "Any official who infringes the rights of another person, by violating his personal freedoms, by unlawfully depriving him of his freedom, or by carrying out an unlawful search of his home, shall be punished by a maximum prison sentence of 3 months or a financial penalty of a maximum of 180 times the daily rate."

Treatment of persons remanded in custody (article 10)

119. Articles 184 et seq. of the Code of Criminal Procedure contain the following definitive provisions regarding the treatment of persons remanded in custody.

120. Under article 184 of the Code of Criminal Procedure, persons remanded in custody may be subjected only to such restrictions as are in accordance with the law and the decrees deriving therefrom, and which are necessary for the attainment of the purpose of the detention or to maintain order and security in the prison establishment. This provision also states:

> "Prisoners must be treated calmly and in a serious, firm and equitable manner, with due respect for their sense of honour, human dignity and, to the greatest extent possible, their person."

121. Article 186 of the Code of Criminal Procedure defines the rights of persons remanded in custody as follows:

1. Persons detained in custody shall, if possible, be kept separate from one another;

2. Detainees of different sexes shall not be held in the same prison;

3. They must be segregated from convicted criminals;

4. They may wear their own clothes;

5. They are entitled to keep, on request, articles necessary for their needs, including money;

6. Detainees may, at their own expense, obtain items for their comfort and engage in activities, to the extent that such activities are compatible with the purpose of the detention, with the prison regulations and with security;

7. They are entitled to free choice of activities during working hours and rest periods, to the extent that such activities are compatible with the purpose of the detention, the prison regulations and security and are not liable to inconvenience other prisoners;

8. They may also engage in the normal activities offered by the prisons without being compelled to work;

9. Persons remanded in custody are also entitled to correspond with persons considered unlikely to interfere with the purpose of the detention, and may request visits from such persons.

122. The treatment of persons in custody is checked weekly by a judge, as provided for in article 189 of the Code of Criminal Procedure:

> "The president of the court of first instance or a judge designated by him shall conduct unannounced inspections of prisons within his jurisdiction at least once a week, in the presence of a judicial official, question prisoners, without any prison officer being present, on their food and treatment and take the necessary steps to correct any abuses found."

123. The treatment of convicted persons is governed by the Prison Code. The purpose of the custodial system is set out in article 20, paragraph 1, which reads as follows:

> "The aim of custodial sentences is to enable convicted persons to acquire an approach to life which is honest and adapted to the requirements of the community and to resist harmful impulses. It should also make clear the harmful nature of the conduct resulting in the conviction."

124. Educational assistance is intended in particular to facilitate the rehabilitation of convicted persons. In this connection, article 56 of the Prison Code states the following:

> "1. The implementation of all measures laid down in the Prison Code should be designed to have an educational effect. Prisoners must also receive special educational assistance either in individual or group discussions or by other appropriate means.
>
> "2. Prisoners for whom it may be useful in order to achieve the educational aim of the custodial sentence shall be provided with psycho-hygienic and psycho-therapeutic help in prisons in which such a request is not contrary to the principles of economical and practical administration based on the average number of prisoners and the average length of sentence."

125. The administration must also ensure that prisoners deficient in the knowledge and skills taught in primary schools have the opportunity to acquire the necessary instruction. Prisons are responsible for providing regular further education courses for prisoners in need of them. Prisoners are also entitled to take courses by correspondence.

126. In addition to educational measures, special note should be taken of the right of each prisoner to attend religious services in the prison and to observe such other religious festivals of his faith as are celebrated collectively and, if need be, to be visited by a minister of his faith.

127. With regard to the general treatment of persons sentenced to imprisonment, article 22 of the Prison Code contains the following fundamental provision:

> "1. Prisoners must be treated calmly and in a serious, firm and equitable manner, with due respect for their sense of honour and human dignity. They shall not be addressed in familiar terms and, when only one prisoner is spoken to, he shall be addressed by his family name, if it is known to the person speaking to him.
>
> "2. Prisoners shall be subject only to the restrictions and enjoy such benefits or relaxations of their sentences as are provided for by law."

128. With regard to the treatment of prisoners held in non-judicial prisons, article 53 (c) of the Administrative Criminal Code contains the following provisions:

> "1. Prisoners may wear their own clothing and be entitled to engage in a suitable occupation, but may not be compelled to do so. They may eat the food of their choice provided, given the facilities available, the

exercise of this right is compatible with the system of supervision and regulations and does not occasion any excessive administrative expenditure. They shall as far as possible be segregated from persons sentenced to terms of imprisonment under laws other than the Federal law in question; in all cases, male and female prisoners shall be segregated.

"2. Prisoners shall be accommodated in simple and suitably-equipped cells, with adequate space and light. Cells shall be well ventilated and heated in the cold season. In non-daylight hours other than during nightly rest periods, they shall be lighted so that prisoners may read and work without impairing their eyesight. Arrangements must be made to enable prisoners to bring to the attention of supervisory personnel any incident calling for their immediate action.

"3. It shall be prohibited to restrict the free flow of their correspondence, which shall be monitored only from time to time. Written communications which are manifestly intended to prepare for, continue or conceal punishable acts shall be withheld. The unhindered dispatch of parcels and money shall be guaranteed. Parcels shall be opened in the presence of the prisoner. Articles likely to be detrimental to order and security shall be handed over to the prisoner upon his release, except where, because of their nature, it is deemed preferable to destroy them.

"4. Prisoners shall be authorized to receive visits during official visiting hours when this is possible without interfering with the necessary supervision, order and security or normal prison routine.

"5. It shall be prohibited to impede the free correspondence of prisoners with, or visits by, national legal authorities and counsel or with bodies established under international conventions for the protection of human rights; it shall also be prohibited to monitor the substance of such contacts. The same is true for relations between foreign prisoners and the diplomatic or consular representatives of their country of origin.

"6. The supreme authorities shall issue regulations for the serving of sentences in houses of detention operated by local administrative authorities or the Federal police. Such regulations shall set out the rights and obligations of prisoners with due regard for the maintenance of order and taking into account the principles of the serving of sentences under the Prison Code, as well as the circumstances relating to premises and personnel."

129. Special rules apply to the treatment of juvenile offenders serving custodial sentences. Juveniles are adolescents of 14 but less than 18 years of age. Younger persons committing punishable acts or omissions cannot be prosecuted.

130. The Act relating to the treatment of juvenile offenders provides that, as far as possible, juveniles must not be remanded in custody or placed in detention pending trial. Where detention is unavoidable, articles 2 and 4 of the Act provide as follows:

"2. Where detention is necessary it shall, as far as possible, take place in a special section of the prison.

"3. Where the physical or mental state of minors remanded in custody does not require an exception, they shall be segregated from adult prisoners and, in any event, from prisoners who might exert a harmful influence on them. Solitary confinement shall be avoided if it is likely to be to the detriment of the prisoner and if he can be detained together with other juveniles without constituting a danger to them.

"4. During the period of detention, juveniles shall engage in occupations and receive instruction wherever possible."

131. With regard to the serving of sentences by juveniles, articles 54 et seq. of the Act concerning the treatment of juvenile offenders contains special provisions. Of particular relevance is article 56 which sets out the aims of juvenile sentences:

"The purpose of custodial sentences for juveniles is to instil in the prisoner self-control, the work ethic and respect for moral values and the law; where the length of the sentence permits, the prisoner shall be trained for an occupation in keeping with his knowledge and abilities and, if possible, with his earlier activities and interests."

132. Article 57 specifies the special qualities required of persons responsible for supervising juvenile prisoners:

"Persons responsible for the supervision of juvenile prisoners shall have an understanding of teaching methods and be familiar with the main psychological, psychiatric and pedagogical theories applicable to their field of activity."

133. With regard to prisons for juvenile offenders, article 58 of the Act relating to the treatment of juvenile offenders stipulates:

"1. Custodial sentences shall in principle be served in establishments specially and exclusively intended for juveniles.

"2. Where juvenile offenders are placed in other prison establishments, they shall be kept separate from adult prisoners so as to render any contact between the two groups impossible. Where and as long as no harmful influence is exerted on other juvenile prisoners:

"1. Adult prisoners of less than 21 years of age may be placed in reformatories for juveniles and

"2. Prisoners subject to the custodial system for juveniles may remain in such reformatories until they reach the age of 24 years. If the remainder of the sentence does not exceed 1 year when they reach the age of 24 years, they may remain subject to the custodial system for juveniles until completion of their sentence.

"3. The competent criminal court shall decide, after consultation with the director of the establishment concerned, whether an adult prisoner should be placed in a reformatory for juveniles. The director of the institution shall decide whether an adult prisoner should remain subject to the custodial system for juveniles in cases where they are expected to have completed their sentence before reaching the age of 21 years. In all other cases, such decisions shall be made by the Federal Ministry of Justice.

"4. The legal provisions governing juvenile prisoners shall be applied to adult prisoners held together with juveniles. However, on request, the director of the institution may excuse them from attending educational classes."

134. Under article 54, paragraph 1, of the Administrative Criminal Code, custodial sentences may not be imposed on adolescents of less than 16 years of age for the commission of offences punishable by the administrative authorities.

135. With regard to the serving of sentences in non-judicial custodial institutions, the legal provisions referred to in article 53 (c) of the administrative criminal system are also applicable to juvenile offenders. In addition, article 53 (e), paragraph 1, of the Administrative Criminal Code states that juvenile prisoners must be segregated from adult prisoners.

Prohibition of imprisonment for debt (article 11)

136. Imprisonment for debt was abolished in Austria in 1868.

137. Article 1 of the Fourth Protocol to the European Convention on Human Rights also prohibits imprisonment for debt. In Austria, this Protocol forms part of constitutional law.

Liberty of movement, rights and freedoms of aliens (articles 12 and 13)

138. Article 4 of the 1867 Basic Law of the State provides that: "The free movement of persons and property within the limits of the territory of the State shall not be subject to any restriction".

139. Article 6, paragraph 1, of the 1867 Basic Law of the State reads as follows:

"Every citizen has the right to establish his residence and his domicile anywhere in the territory of the State, to acquire and dispose freely of immovable property of any kind and to engage in any occupation subject to the conditions laid down by law."

140. Article 2 of the Fourth Protocol to the European Convention on Human Rights states:

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own."

Article 3, paragraph 2, of the Fourth Protocol reads:

> "No one shall be deprived of the right to enter the territory of the State of which he is a national."

141. All the above provisions, which form part of constitutional law, must be regarded as a unit. Taken as a whole, they state that:

1. Anyone who is lawfully in Austria has the right to liberty of movement and freedom to choose his residence.

2. All persons, including Austrians, are free to leave Austria.

3. All Austrians have the right to enter their country.

142. For Austrian nationals, the exercise of these rights is subject to restrictions provided for by the Military Act in order to guarantee national security. Article 17, paragraph 6, of this Act reads:

> "Persons who are liable for military service and who have performed their basic active service for at least six months are required, during the six months following their discharge, to inform the competent military authorities without delay of any change in their usual domicile. During that period, persons liable for military service may leave the Federal territory for more than three days only with the authorization of the competent military authorities, except as otherwise provided in paragraph 5 of the relevant decree. Such authorization must not be refused except for military reasons. It shall be assumed to have been given if, during the two weeks following receipt of the written request, the military authority does not refuse to allow the young soldier concerned to leave the Federal territory. Persons liable for military service who had their usual domicile abroad immediately before beginning their basic active service and at the time of their discharge from such service may keep such domicile without authorization from the competent authorities."

143. Freedom to emigrate is a right guaranteed by the Austrian Constitution. The act of leaving the national territory is not in itself regarded as emigration; there must also be the intention of not returning in order to choose one's residence in Austria. The intention must be no longer to have the focus of one's social and economic life in Austria. An Austrian emigrant does not lose his Austrian nationality. He is also not required to pay the Government an amount of money in order to emigrate.

144. The legal status of aliens is governed primarily by the Aliens Police Act. Any person who does not have Austrian nationality is regarded as an alien. Article 2, paragraph 1, of the Aliens Police Act contains the following basic provision:

> "Under the provisions of this Federal Act, aliens are entitled to indefinite residence in the Federal territory, provided that the duration of their residence is not limited by international agreements or by their visa".

145. The right of aliens to reside in Austria, to liberty of movement and to freedom to choose their domicile is subject to the restriction that an order prohibiting residence may be issued. The relevant provision is article 3 of the Aliens Police Act, which reads:

"1. An order prohibiting residence may be issued against an alien if, in the light of specific facts, it may be assumed that his residence in the Federal territory is a threat to public peace, order or security or if such residence is contrary to other public interests referred to in article 8, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

2. Specific facts within the meaning of paragraph 1 include the following:

If an alien:

1. Has been definitively sentenced by an Austrian court to more than three months' imprisonment, to more than six months' suspended imprisonment or punished more than once for offences resulting from the same harmful proclivity; a sentence handed down abroad is regarded as equivalent to those handed down in Austria if it meets the conditions set out in article 73 of the Criminal Code;

2. Has been definitively sentenced in Austria for having committed a serious administrative misdemeanour or for having more than once breached the aliens police laws, as well as the laws governing passports, border surveillance or declarations of presence;

3. Has been sentenced in Austria for having deliberately committed tax fraud, with the exception of a breach of the financial regulations, or for having knowingly violated the currency regulations;

4. Has been difinitively sentenced in Austria for a serious breach of the legal provisions relating to prostitution or has been definitively sentenced in Austria or abroad for having committed a crime as a procurer;

5. Has been accused of complicity in helping aliens to enter or leave the Federal territory illegally for payment;

6. Has supplied false information to an Austrian authority or agency concerning himself, his personal status, the purpose of his stay and the amount of time he expects to wait before being allowed to enter or stay, in accordance with article 2, paragraph 1;

7. Is unable to prove that he has the necessary resources for his subsistence unless he was lawfully employed for a total of three years during the previous five years in Austria.

3. If an order prohibiting residence constitutes interference in the private and family life of an alien, it may be admissible only if it is absolutely necessary to achieve the objectives referred to in article 8,

paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. In any event, an order prohibiting residence is admissible only if, in the light of decisive public interests, the negative consequences of a non-prohibition on residence are much greater than the effects on the living conditions of the alien and his family. In so determining, account must be taken of the following:

1. The length of residence and extent to which the alien or his family is integrated;

2. The closeness of family and other ties;

3. The adverse effects which such a measure might have on the professional or personal career of the alien or his family."

146. Such prohibitions may be ordered for all or part of the Federal territory and for a limited or unlimited period of time. An alien against whom an order prohibiting residence is issued must leave the territory in which he is prohibited from residing within one week of the time the order enters into force. He is not entitled to enter that territory without authorization during the period when the order is in force.

147. A prohibition on residence must be issued as a formal order. The alien in question is entitled to apply for the legal remedies referred to in part 1 of this report in order to have the prohibition lifted. Moreover, the authority which issued the prohibition is required to lift it upon request or automatically if the reasons which led to the order cease to exist.

148. The following table gives an idea of the number of aliens who enter Austria:

Border crossings by aliens:

1984	7,276,000
1985	7,544,000
1986	7,379,000
1987	7,735,000

149. With regard to entry and departure by Austrian citizens, article 3, paragraph 1, of the Passport Act states:

"Austrian citizens must have a valid travel document (passport or equivalent) to leave and return to the Federal territory, except as otherwise provided by international agreements or international custom. It is prohibited to deny the right to enter the Federal territory to an Austrian citizen who, lacking a valid travel document, can nevertheless prove his nationality and identity, without prejudice to the responsibilities provided for in article 40, paragraph 1."

150. Austrian citizens are entitled to a passport.

Procedural guarantees (article 14)

151. In addition to the explanations given in the initial report, account should be taken of the following:

1. As a result of the 1983 amendment of the Code of Civil Procedure, reciprocity is no longer required in order to obtain legal assistance; aliens are thus on a footing of equality with Austrian citizens in this regard.

2. Since the entry into force of the 1987 amendment of the Code of Criminal Procedure, the courts have been authorized to provide the accused, on request, with defence counsel free of charge even in proceedings before district courts (minor or less serious offences). This extension of legal assistance means a not inconsiderable improvement in the accused person's legal position in most criminal proceedings.

3. The procedure for appealing sentences handed down by magistrates' or jury courts has, as a result of the 1987 amendment of the Criminal Code, undergone an improvement that had been necessary for a long time. In jury trials, a court's evaluation of the evidence may be challenged on appeal, i.e., if the records show that there are considerable doubts as to the truth of the facts serving as a basis for the verdict of guilt.

Prohibition of retroactive criminal law (article 15)

152. Article 1, paragraph 1, of the Austrian Criminal Code embodies the general principle "nulla poena sine lege". It reads:

"A penalty or preventive measure may be imposed only in connection with an act expressly characterized as an offence by law and already liable to a penalty at the time it was committed."

153. The first sentence of article 1, paragraph 1, of the Criminal Code contains the following provision:

"A penalty more severe than the one by which an act was punishable at the time it was committed may not be imposed."

154. Since, according to the general principles of law, the court must apply the law in force at the time of the sentence, it follows that, if a lighter penalty was introduced legally before the sentence was handed down, the court is required to impose the lighter penalty.

155. These principles of law also apply to the administrative criminal system. Article 1 of the Administrative Criminal Law Act reads as follows:

"(1) An administrative offence (an act or an omission) may be punished only if it was punishable by a penalty before it was committed.

(2) The punishment shall be determined by the law in force at the time the act was committed, unless the law in force at the time the sentence is handed down by the court of first instance is more to the advantage of the offender."

156. According to court practice, an act liable to a penalty at the time it was committed and no longer subject to a penalty at the time the sentence is handed down will go unpunished.

157. The same is true of the law governing tax offences.

Recognition of the legal personality of the individual (article 16)

158. Article 16 of the Austrian General Civil Code of 1811 provided that:

> "Every human being has inherent rights which are apparent from reason and is accordingly to be regarded as an individual."

159. In addition, articles 17 to 19 of the Austrian General Civil Code reads as follows:

> "Article 17. Anything in keeping with natural rights is regarded as valid as long as no legal limitation on such rights has been proved.
>
> Article 18. Every individual is capable of acquiring rights under the conditions provided for by law.
>
> Article 19. Anyone who considers that his rights have been violated may lodge a complaint with the authorities provided for by law. However, anyone who, in defiance of the law, takes justice into his own hands or goes beyond the limits of self-defence shall be responsible therefor."

Protection of the right to privacy (article 17)

160. Privacy is above all protected by the fundamental right to data protection. Article 1 of the 1978 Data Protection Act, which is an integral part of constitutional law, reads as follows:

> "1. Everyone has the right to secrecy of his own personal data in so far as he has an interest therein that merits protection, especially as regards respect for his private and family life.
>
> "2. Any limitation of this right is admissible only to preserve the legitimate interests of another party or by virtue of laws required for the reasons set out in article 8, paragraph 2 of the European Convention on Human Rights. Even if such limitations are necessary, priority shall be given to confidential treatment of personal data.
>
> "3. If personal data are processed by computer, all persons are entitled to know, in accordance with the provisions of the law who is investigating and processing their personal data, as well as to determine the source of the information, the nature and content of the data, and to know for what purpose they are used.
>
> "4. If personal data are processed by computer, all persons are entitled, in accordance with the law, to have inaccurate data corrected and any data obtained illegally deleted.
>
> "5. Restrictions on the rights set out in paragraphs 3 and 4 are inadmissible except as specified under paragraph 2.

"6. Provided that subjects at law operate in the sphere of private law, the fundamental right to data protection is exercised through the ordinary courts".

161. Pursuant to the Data Protection Act, a Commission on Data Protection has been established to protect the rights of those concerned. The Commission rules on petitions against violations of the provisions of the Act, or against implementation orders based on the Act, if the petitioner claims that his rights have been infringed.

162. Appeals may be made against the rulings of the Commission on Data Protection either before the Administrative Court or the Constitutional Court.

163. Protection of privacy under criminal law is a specific problem. In the case of offences against public morals, the 1987 amendment to the Code of Criminal Procedure considerably extended the protection of victims of crimes in criminal proceedings. The court is responsible for carefully striking a fair balance between the constitutionally guaranteed rights of the witness to protection of his privacy and the obligation to seek the truth. Victims of sexual crimes are not compelled to answer questions concerning their private life (and in particular their sex life) and are even entitled to refuse to provide details that would constitute aggravating circumstances. The judge is responsible for informing the witness of this right as soon as appropriate. Furthermore, victims of offences against public morals have the right to insist on being questioned only in the presence of a reliable person of their choice. When the person being questioned is a minor or handicapped, a reliable person must be appointed ex officio.

164. Victims of an offence against public morals are further protected by the legal requirement that the court must ensure, in particular by prohibiting photographs during the proceedings, that the identity of the person whose privacy has been infringed is not made public. If the legitimate interests of the accused or of the witness so require, the court must order the proceedings to be held in camera, either ex officio or on request, before any aspects of personal or private life are discussed (cf. art. 14, para. 1, of the Covenant).

165. Since the 1987 amendment to the Code of Criminal Procedure came into force, all authorities connected with criminal proceedings are, as a matter of principle, required to inform the victim of a crime of his procedural rights.

166. Protection of the home against arbitrary or illegal violations is guaranteed by the Act of 27 October 1862 on the Protection of Proprietors' Rights. In principle, this Act is a means of preventing unlawful searches of the home. The basic provisions of the Act, namely, articles 1 to 3, read as follows:

"Art. 1. A search of premises, that is, a search of a home or the appurtenant premises may be undertaken only on the strength of a substantiated judicial warrant. This warrant shall be served on the party concerned immediately or at the latest within 24 hours.

"Art. 2. For the purposes of criminal procedure, a search may, in the case of immediate danger, also be ordered without a warrant by court officials, officials of the security authorities or by mayors. The individual delegated to execute the order shall be provided with a written authorization which he shall produce to the party concerned.

"For the same purposes, a search may also be undertaken by the security authorities on their own responsibility if a warrant to appear in court or a warrant of arrest is issued against an individual, or if an individual is caught in fragrante delicto, suspected of committing an offence on the score of public pursuit or public reputation, or found in possession of items which indicate participation in such an offence.

"In both cases, the party concerned shall, on demand, be served immediately or within 24 hours with the certification relating to the execution of the search and the reasons for it.

"Art. 3. Searches for the purposes of police and financial supervision may be undertaken only in special cases as laid down by law. None the less, the provisions of the foregoing paragraphs also apply to authorization for a search and certification of its execution".

The purpose of the Act on the Protection of Proprietors' Rights, as set out in Decision No. 2182 of the Constitutional Court, is to avoid "interference in the life of the proprietor of a dwelling to the detriment of his dignity and independence".

167. In accordance with the established practice of the Constitutional Court, a search of the home consists in "a search for an individual or an object whose whereabouts are unknown".

168. According to the established practice of the Constitutional Court, the concept of "home" is to be interpreted in the broadest sense. The Court's practice not only protects the home in the strictest sense of the word, but also premises in the basement, stables, barns, the editorial premises of a publishing house or newspaper, a doctor's surgery or even the headquarters of an association. The same protection extends to hotel rooms.

169. From the standpoint of criminal proceedings, a home may be searched only if there is "reason to believe that a person suspected of having committed a crime or offence is hiding in the premises in question or that they contain objects whose possession or inspection may be of importance for a specific investigation" (Code of Criminal Procedure, art. 139, para. 1).

170. The requirements for the issue of a search warrant are laid down by the Code of Criminal Procedure, article 140, paragraph 1:

"As a general rule, searches must be preceded by questioning of the person concerned and carried out only if such questioning has not led to the voluntary surrender of the object sought or to the elimination of the grounds for the search."

171. As regards the conduct of searches, article 142 of the Code of Criminal Procedure contains more precise provisions:

> "1. In conducting searches, efforts must be made to avoid any unnecessary commotion and to avoid inconvenience or disturbing the persons concerned any more than is absolutely necessary, and as far as possible to protect their reputation and private matters unrelated to the investigation, and strictly observing the rules of propriety and courtesy.
>
> "2. The occupant of the premises must be present during the search. When that is impossible, an adult member of the family or, failing that, a person living in the same household or a neighbour must be invited to be present.
>
> "3. A clerk of the court and two legal witnesses must also be present.
>
> "4. The report on the search must be signed by all those present. If nothing suspicious has been found, a certificate testifying to this fact must be issued, at his request, to the person concerned."

172. An appeal may be made in chambers against a search ordered on the basis of a warrant.

173. A search may be ordered without a warrant in the three following cases:

(a) Article 141, paragraph 1, of the Code of Criminal Procedure states that, in criminal cases, a search may be ordered by judicial or security officials, even without a warrant, when there is an immediate danger. Moreover, the security authorities may also carry out a search on their own initiative if a warrant has been issued for the detention or arrest of an individual or if the person in question has been caught in flagrante delicto, is wanted by the police, is suspected of having committed an offence or found in possession of items which suggest participation in an offence.

(b) Furthermore, searches may be carried out by the police in the performance of their duties provided that they are authorized by specific laws, of which there are very few. One example is article 42 of the Explosive Substances Act, which authorizes the search of the home of a person suspected of possessing, manufacturing or having unlawfully acquired or imported explosives. The Telecommunications Act authorizes the search of a home if there are good reasons for believing that a person has installed, modified or used a telephone unlawfully.

(c) Lastly, searches may be authorized for financial verification purposes, in connection with proceedings relating to tax or customs offences.

174. Under article 93 of the Criminal Code on Taxation, a search may be carried out only on the basis of a written warrant issued by the director of the financial verification authorities. The warrant must be served on the person concerned either immediately, or within 24 hours of the search. If there is an immediate danger, the financial or customs authorities and the security authorities may conduct a search without notice. Persons whose house

is to be searched may request the presence of two persons whom they trust. Moreover, a certificate indicating the purpose, grounds for and results of the search must be issued to the person concerned at his request, either immediately or within 24 hours.

175. Under article 109 of the Criminal Code, forcible entry into another person's home, either by the use of threats or violence, is punishable as a violation of domicile.

176. The secrecy of telecommunications also does much to protect privacy, the family and the home. Such secrecy is a right guaranteed by the Austrian Constitution. Article 10 of the Basic Law of the State reads as follows:

> "Privacy of telecommunications must not be violated.
>
> "The only exceptions to the above provision are those based on a warrant issued in accordance with the laws in force."

177. Articles 149 (a) and 149 (b) of the Code of Criminal Procedure contain the following provisions on the monitoring of telecommunications:

> "Article 149 (a)
>
> "1. The monitoring of a telephone communication, including the recording of its content, is admissible only when there is reason to believe that it will help to elucidate a criminal act punishable by a prison sentence of one year or more and provided that:
>
> > "1. The owner of the telecommunication installation is himself under serious suspicion of having committed the criminal act or,
> >
> > "2. There is reason to believe that a person under serious suspicion is with the owner of the telecommunication installation or will contact him by means of the installation, unless the owner is a person covered by article 152, paragraph 1.2, or yet
> >
> > "3. The owner of the installation has given his express consent to monitoring.
>
> "2. The judge in chambers is responsible for ordering the monitoring of telecommunications. If there is an immediate danger, the examining magistrate is also empowered to order monitoring, although he must immediately request authorization from the judge in chambers. If the authorization is refused, the examining magistrate shall withdraw his warrant and ensure that the recordings are destroyed without delay.
>
> "3. In order to monitor telecommunications, a request must be made to the security authorities in agreement with the telecommunications authorities.

"Article 149 (b)

"1. As soon as there is no longer any reason to continue the monitoring, the judge in chambers must order the immediate end of the monitoring. If appropriate an order terminating the criminal proceedings is issued at the same time by the examining magistrate.

"2. When the monitoring operation has ended, the examining magistrate is required to inform the owner of the telecommunication installation as well as the suspect (accused) that he has been monitored. The owner of the installation and the suspect (accused), if he is not the owner, may acquaint themselves with the content of the recordings, but only if such recordings are of importance to the criminal proceedings under way or to be initiated against them. When they acquaint themselves with the recordings, the owner of the installation and the suspect (accused) may request that the recordings in question should be preserved. If this request is not made, the examining magistrate may include in the court records only those recordings that are of importance to criminal proceedings already under way or to be initiated; any recordings that are not included in the records must be destroyed.

"3. If the owner of the telecommunications installation being monitored considers that his rights have been infringed because the judge in chambers ordered or authorized the monitoring, or because it was carried out, he may lodge an appeal with the court of second instance within 15 days of the examining magistrate's decision (article 114). If the appeal is found to be justified, all recordings made in the course of unlawful monitoring are destroyed, unless their preservation has been ordered under paragraph 2."

178. Administrative authorities, and in particular the police authorities, are not legally authorized to order monitoring of telecommunications.

179. The Austrian Constitution guarantees privacy of correspondence against any unlawful interference. Article 10 of the 1867 Basic Law of the State states:

"Secrecy of correspondence may not be violated; except in the case of lawful arrest or house search, correspondence may be seized only in time of war or by virtue of a judicial order in accordance with the laws in force."

180. Violation of the secrecy of correspondence is punishable under article 118 of the Criminal Code.

181. In accordance with article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 10 of the 1867 Basic Law of the State, the requirement that the secrecy of written correspondence must be respected implies the obligation of the State to facilitate the unrestricted and rapid circulation of letters, not to seize letters, to refrain from imposing "postal prohibitions", and to ensure the secrecy of correspondence. Consequently, it is prohibited to open letters, to determine their contents, to copy or censor them. The term "letter" covers all written communications from one person to another that replace oral communication, without

distinction of any kind, whether written by hand, machine or by a copying device. The postmark on a letter as described above is an essential feature ensuring the secrecy of correspondence. The term "letter" frequently implies a sealed envelope.

182. Provisions on the seizure and opening of letters and other correspondence ordered in criminal proceedings are contained in articles 146 et seq. of the Code of Criminal Procedure.

183. With regard to the requirements for the seizure of letters, article 146, paragraph 1 of the Code of Criminal Procedure reads as follows:

> "If the accused has already been detained for a crimi.al offence punishable by a custodial sentence of at least one year or when an order to appear or arrest warrant has been issued against him for such an offence, the examining magistrate may seize telegrams, letters or other correspondence sent by or addressed to the accused and request the post and telegraph offices and other transport bodies to hand them over to him."

184. With regard to the opening of correspondence seized, a distinction should be made between two situations. If the accused agrees to an inspection of the correspondence, the examining magistrate is authorized to open it immediately. If the accused withholds his consent, the examining magistrate is required, unless there is an immediate danger, to obtain the authorization of the judge in chambers.

185. The persons concerned must be immediately informed of the seizure of correspondence. Article 148 of the Code of Criminal Procedure states:

> "The accused, and in his absence a member of his family, must be informed immediately, or at the latest within 24 hours, of the seizure of correspondence. When the correspondence has been opened, the original letters and telegrams, or copies thereof, shall be handed over in full or in part to the accused or to the addressee, providing that this does not affect the pre-trial investigation. If the accused is absent, they shall be handed over to a member of his family. If the accused has no relatives, they shall be returned to the sender, if the magistrate considers that his interests are involved; if, however, the letter or telegram is to remain in the court record, the sender shall be informed of its seizure."

186. The correspondence of persons serving custodial penalties is naturally subject to specific restrictions. Articles 86 et seq of the Prison Code contain special regulations governing the correspondence of prisoners.

187. Protection of a person's honour and good repute is ensured by the fact that infringements thereof constitute punishable acts. The main legal provision on the subject is article 111 of the Criminal Code;

> "1. Any person who, in a manner noticeable to third parties, criticises another person as having contemptible qualities or ideas or accuses him of immoral behaviour that could make him contemptible and degrade him in the public mind, shall be punished by a maximum prison sentence of six months or by a maximum fine of 360 times the daily rate.

"2. Any person who commits the above offence in print, by broadcasting or in any other way that brings the defamation to the attention of a broad audience, shall be punished by a maximum prison sentence of one year or to a maximum fine of 360 times the daily rate.

"3. The author shall not be punished if the assertion is proved to be true. In the case covered by paragraph 1, the author shall not be punished if it is proved that circumstances gave him sufficient reason to believe the assertion to be true."

188. Under article 117 of the Criminal Code, an action can be brought for impugument of a person's honour only at the request of that person.

Freedom of thought, conscience and religion (article 18)

189. Freedom of religion and conscience was guaranteed as long ago as in 1867, by article 14 of the Basic Law of the State:

"Full freedom of belief and conscience is guaranteed to everyone.

"The enjoyment of civil and political rights is independent of religious confessions; nevertheless civil duties may not be neglected on the grounds of religious confession.

"No person may be compelled to take part in religious activities or to attend a religious ceremony except in so far as he is subject to the authority of another person duly authorized by law."

190. As regards the composition of the Austrian population, of a total of 7,555,338 persons, 6,372,645 are members of the Roman Catholic Church, 423,162 are members of the Protestant Church of the Augsburg or Helvetic Confessions, 307,492 profess some other religion and 452,039 are without any religious affiliation.

191. The Federal Religious Instruction Act contains basic legal provisions regarding children. Under this Act, parents are free to decide by mutual agreement the religion in which the child will receive instruction, providing that they have guardianship and responsibility for the child's upbringing. This agreement may be revoked at any time and is terminated following the death of one of the spouses.

192. If no such mutual agreement exists or if it has ceased to exist, the provisions of the Austrian General Civil Code governing the guardianship and upbringing of children also become applicable to religious instruction.

193. However, children who have reached 14 years of age have the right freely to choose their religion. Once children reach the age of 12, they may no longer receive instruction against their will in a religion different from the one they practised previously.

194. Under article 4, paragraph 4, of the Interconfessional Relations of Citizens Act of 25 May 1868, children of 14 years and more, without distinction as to sex, have the right to choose their religion freely in accordance with their own beliefs, and their free choice must, if necessary,

be protected by the authorities. Every individual may of his own free will decide to leave a religious community; the authorities must be informed, however, if his decision is to have legal effect.

195. Religious freedom is also protected by criminal law provisions, under which anything done to discredit religious tenets or to disturb a religious service is considered to be a punishable act.

196. Article 188 of the Criminal Code states:

> "Whoever publicly discredits a person or object worshipped by a church or religious community recognized in Austria, or a belief, custom or institution recognized by law and connected with such church or religious community, or ridicules such persons or objects, under circumstances in which his or her attitude is likely to cause justified disapproval, shall be liable to a prison term of up to six months or a fine of up to 360 times the daily rate."

197. Disturbance of a religious service, the repose of the deceased or a funeral ceremony is also punishable by law.

198. The practice of a common and public religion by churches and religious communities recognized by law is guaranteed by article 15 of the 1867 Basic Law of the State, which has the status of constitutional law. The constitutional provision of article 63, paragraph 2, of the Treaty of St. Germain stipulates:

> "All inhabitants of Austria shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals."

199. Article 18, paragraph 4, corresponds in principle to the substance of article 2 of the First Protocol to the European Convention on Human Rights, which establishes the right of parents to ensure their children's education in conformity with their own convictions, and is therefore a constitutional right in Austria.

Freedom of opinion (article 19)

200. The right to freedom of opinion in Austria is guaranteed by the Constitution. It is based primarily on article 13 of the 1867 Basic Law of the State:

> "Everyone has the right to express his opinion freely, within the limits established by law, in speech, in writing, in print or in pictorial form.
>
> "The Press may neither be subject to censorship nor to the licence system. Administrative postal prohibitions cannot be extended to apply to printed matter in the country."

201. In addition to the regulations set out in the Basic Law of the State, article 10 of the European Convention on Human Rights is regarded as directly applicable constitutional law in Austria.

202. The current legal situation has not changed since the last report. However, some statistical data might be of interest.

203. Radio and television are particularly important in the dissemination of information. Television broadcasting has in particular expanded enormously in Austria. Only 1,420 television licences were issued in 1955, while a mere 15 years later television had become quite widespread, and approximately 1.5 million licences had been issued. Since then television broadcasting has nearly doubled, and in 1987 2.5 million television licences were issued in Austria. This means that 88 of every 100 households has a licence, and that television therefore constitutes a major mass information and communications medium.

204. There are 2.7 million radio licences, which implies that 95 of every 100 households receive radio broadcasts. At the end of 1987 Austria had over 623 radio broadcasting stations and 949 television stations. According to the latest information, dating from 1987, 26.2 per cent of television broadcasts consisted of films and serials, 10.6 per cent of programmes on social topics, youth and the family and 10.5 per cent of current events programmes.

205. In 1987, Austria had 32 different newspapers, one published in Lower Austria, three in the Tyrol and Vorarlberg respectively, four in Styria, five in Carinthia, Upper Austria and Salzburg respectively, and six in Vienna. A total of 141 weeklies were published in 1987.

206. The promotion of the press which began in 1979, is of particular importance in maintaining a diversity of opinions, and State subsidies to Austrian daily and weekly newspapers partially cover sales and information - transmitting costs. Moreover, subsidies are granted not only to newspapers but also to non-profit representative associations whose primary function is to organize press conferences and to those whose main task is to provide training and vocational proficiency courses for journalists working for the Austrian media.

207. In 1989, an amount of S67.2 was distributed in the form of subsidies to 16 daily newspapers, 58 weeklies, 4 press clubs and 4 professional training institutions for journalists.

208. Apart from these subsidies, special steps are taken to promote media diversity, and include the subsidization of smaller newspapers that are of particular importance in shaping political opinion and will. The sum of S38.4 million was used in connection with this form of promotion.

209. Austrian publishing houses produce approximately 10,000 books a year. For example, the number of new books published in 1986, namely, 10,281 was slightly higher than the number published in 1987 (9,786). These new books are mainly of a specialized nature, dealing in particular with economics and the social sciences, statistics and the natural sciences, and technical, industrial and handicraft matters.

210. In 1987, specialized journals and magazines published 2,364 issues of which 155 dealt with political, social policy or environmental issues, 146 with general trade and industrial policy issues, 144 with questions relating to the Catholic religion, and 114 with technical questions.

211. Freedom of opinion is restricted by the provisions of the Criminal Code on various matters, and in particular those on the offence of defamation described above in another context, and on violations of privacy and of certain types of professional secrets.

212. Other restrictions on freedom of opinion reflect the need for professional secrecy on the part of public agents as well as doctors, lawyers and notaries.

Prohibition of war propaganda (article 20)

213. Any kind of war propaganda and incitement to national, racial or religious hatred is prohibited under article 283 of the Criminal Code:

> "1. Whoever publicly, in a manner likely to endanger public order, urges or incites others to commit a hostile act against a church or religious community existing in the country or against a certain group owing to its affiliation to such a church or religious community, or to a race, nation, tribe or State, shall be punished by imprisonment for up to one year.
>
> "2. The same punishment shall be imposed on any person who publicly, in a manner which violates human dignity, stirs up hate against any of the groups referred to in paragraph 1, or insults it or seeks to disparage it."

214. Mention should be made in this context of the prohibition of genocide, contained in article 321 of the Criminal Code:

> "1. Whoever, with intent to completely or partly annihilate a group defined by its affiliation to a church or religious community, race, nation, tribe or State, kills members of the group; causes them grievous bodily harm or mental harm; subjects the group to conditions of life likely to lead to the death of all or part of its members; imposes measures to prevent births in the group; or by using violence or the threat of violence transfers children from the group to some other group; shall be punished by life imprisonment.
>
> "2. Whoever conspires with another person jointly to commit any of the offences enumerated in paragraph 1 hereof, shall be punished by imprisonment for between one and ten years."

The right of peaceful assembly (article 21)

215. The right of peaceful assembly has been guaranteed to Austrian citizens since 1867. Article 12 of the 1867 Basic Law of the State states that: "Austrian citizens have the right to assemble and to form associations. The exercise of this right shall be regulated by special acts."

216. In view of the fact that the provisions of the European Convention on Human Rights have acquired constitutional status and are now an integral part of Austrian law, the restriction of article 12 of the Basic Law of the State to Austrian citizens was suspended so as to make the Law applicable to all persons living in Austria.

217. More detailed provisions on the right of assembly are contained in the Meetings Act, article 1 which states that meetings may be held within the limits set forth in the Act.

218. Anyone wishing to hold a public meeting or demonstration must inform the competent authority accordingly. In this context, article 2, paragraph 1, reads as follows:

> "Any person who wishes to organize a public meeting or assembly in general not limited to invited guests, is required to notify the competent authority in writing at least 24 hours beforehand, indicating the purpose, place and time of the meeting. The notification must reach the authority at the latest 24 hours before the meeting is to take place."

219. Electoral meetings and discussions between electors and their elected deputies are exempted from the provisions of this Act provided that they take place at the time of the elections and not in the open air. Also exempt from the provisions of the Act are wedding and other processions, public entertainments, burials, etc.

220. Meetings whose purposes are contrary to the criminal laws or meetings likely to endanger the public safety or welfare are prohibited by the authorities. Similarly, persons may not attend such meetings bearing arms.

221. As regards the right to hold meetings, article 8 states that aliens may not promote, organize or preside over any meeting for the discussion of public affairs.

222. The authorities may send observers to any meeting, and any meeting held in contravention of the provisions of the Meetings Act can be prohibited and, if necessary, broken up by the authorities. A meeting may also be broken up if it is marked by illegal incidents or events likely to endanger public order.

223. Criminal law provisions protect any meeting that is convened legally. For example, article 284 of the Criminal Code refers to the violent dispersal of a meeting and states the following:

> "Whoever, by using or threatening to use violence, prevents or breaks up a meeting, parade or similar event that has not been prohibited shall be punished by imprisonment for up to one year."

224. The following are also punishable: acts aimed at preventing or disturbing a meeting, either by making the place of the meeting inaccessible, preventing people from participating in the meeting, disturbing the meeting through the threat of violence or ousting the person invited to organize the meeting and maintain order.

<u>The statutory régime governing associations (article 22)</u>

225. The law governing associations is also based on article 17 of the 1867 Basic Law of the State mentioned above in connection with article 21 of the Covenant. In the area of freedom of association too, the principle is that this right has been accorded to all, ever since the provisions of the European Convention on Human Rights assumed the status of constitutional law in Austria.

226. Paragraph 3 of the Decree of the Provisional National Assembly of 30 October 1918, which also has the status of constitutional law, states:

> "The special provisions relating to the right of assembly and public demonstration, together with the provisions relating to the statutory régime governing associations, are hereby repealed. The freedom of assembly and association shall be fully restored without distinction as to sex."

227. These regulations related t the special provisions instituted during the First World War limiting freedom of assembly and association. In addition, the regulations abolished particular features of the right of association as it existed at that time, when that right admitted of specific restrictions with respect to women.

228. The right of association is regulated in detail by the Associations Act, in accordance with which persons intending to form an association are required to give written notice of their proposed action to the head of the Land government. The statutes must be appended to the application and indicate the purpose of the association, its official address, the rights and obligations of its members, the names of its prospective officers, its financial resources and how they are to be mobilized, how decisions are to be taken, the ways of resolving internal disputes, external representation of the association and the conditions in which it may be wound up. It is not the responsibility of the head of the Land government to authorize the formation of an association; he can only decide not to allow its formation. The formation of an association may be forbidden only for reasons such as those set forth in article 11, paragraph 2, of the European Convention on Human Rights or if the association is unlawful by virtue of its purpose, its name or its organization. Formation of an association may also be prohibited if there is felt to be a danger that it may continue an unlawful activity engaged in by an association already dissolved by the competent authority. In addition, an association must be prohibited within six weeks of the application to form it; in the absence of a prohibition, formation of the association may proceed. Any decision to forbid the formation of an association must be duly substantiated. Such a decision by the head of the Land government may be challenged by an appeal to the Federal Minister of the Interior, and if the Minister decides against the association, the appeal may be taken to the Constitutional Court.

229. If the formation of an association is not prohibited within the above-mentioned time-limit, the association may embark upon its activities.

230. Article 20 of the Associations Act contains a fundamental provision:

> "No association may take decisions or pass resolutions which are contrary to criminal law or by means of which it would arrogate to itself authority lying, in practice or formally, with the legislature or the executive."

231. Action by an association of the kind provided for in article 20 of the Act may result in the dissolution of the association. The relevant provision is article 24, which reads:

"An association may be dissolved if it takes decisions or passes resolutions contrary to article 20 of this Act, if it exceeds the sphere of activity defined by its statutes or, in general, if it no longer meets the conditions for its legal existence."

232. It is also the responsibility of the head of the Land government to order the dissolution of an association. In this case the decision may be appealed by means of the right of appeal already mentioned in connection with the prohibition of formation of an association. The appeal must be addressed to the Federal Minister of the Interior, whose decision may again be appealed to the Constitutional Court.

233. In 1988, there were 73,708 registered associations. Of these the most numerous (16,573) were concerned with gymnastics or sport. They were followed by savings associations (11,877), and by cultural, musical, theatrical and choral associations (9,366). The large number of associations is all the more apparent if one bears in mind that there were 2,304 communes in Austria in 1987. Apart from those already mentioned, there are a number of other associations, such as charitable and social assistance associations, leisure associations, students' and parents' associations, religious, professional associations, and so on.

234. The Austrian Trade Union Confederation is also organized on the basis of an association. Since 1945, there has been a unified trade union confederation; in other words, trade unions are no longer organized on political party lines. Under article 1 of the statutes of the Austrian Trade Union Confederation, the Confederation is a professional association based on voluntary membership and on the democratic principles transcending political parties. The Confederation is composed of all wage-earning workers (manual and non-manual workers, public servants, including men and women under apprenticeship or in a similar situation) and represents their social, economic and cultural interests.

235. The Austrian Trade Union Confederation is subdivided into the following 15 unions:

(a) Federation of Private Sector Employees;

(b) General Federation of Public Services;

(c) Federation of Communal Services Personnel;

(d) Federation for the Entertainment Industry, the Media and the Liberal Professions;

(e) Federation of Wood and Construction Workers;

(f) Federation of Chemical Industry Workers;

(g) Federation of Railway Personnel;

(h) Federation of Printing and Paper Industry Workers;

(i) Federation of Commerce and Transport Workers;

(j) Federation of Hotel Industry and Personal Service Workers;

(k) Federation of Agricultural and Forestry Workers;

(l) Federation of Food and Related Industry Workers;

(m) Federation of Engineering, Mining and Energy Workers;

(n) Federation of Textile, Clothing and Leather Workers;

(o) Federation of Postal and Telegraph Workers.

236. Manual and non-manual workers who are not of Austrian nationality are also fully entitled to join trade unions.

Protection of the family and the right to marry (article 23)

237. In its first report, Austria dealt in detail with the implementation of article 23 in the Austrian legal system. Nevertheless, some further explanation may be called for.

238. In 1985, the Constitutional Court decided to rescind a legal provision under which a married woman was entitled to use her husband's name but was authorized to add her maiden name. On the other hand, if the betrothed couple had decided to opt for the woman's name as the future family name, which was permitted, the man was not entitled to place his former family name after that of his wife. The Constitutional Court expressed objections to this provision on the grounds that the desire of men to use a double family name could be based on reasons just as objective as those of women. The Court ruled that in principle the betrothed couple would by mutual consent choose as the future family name either the man's name or the woman's name. Only such mutual consent would sufficiently assert the principle of equality of the spouses. The legal provision whereby the woman could add her maiden name to that of her future husband if they chose the latter's name took account of a need of the "losing" partner, as a result of the obligation to reach an agreement on the family name, regardless of his or her sex. That provision, under which the man was not entitled to add his former name after his wife's family name if they decided to use her name, was rescinded on the grounds of the principle of equality between men and women.

239. Subsequently, a new legal provision was enacted under which the spouses are obliged to use the same family name. The spouses will decide before or at the time of their marriage whether they wish to use the man's name or the woman's name. If no decision is taken, it is presumed that the man's name has been chosen. According to the choice of family name, the other spouse has the right to add his or her own name.

240. Austrian marriage law is based on the principle of equality between the spouses. Article 89 of the Austrian General Civil Code states: "The personal rights and duties of the spouses are equal unless this chapter provides otherwise".

241. Now that the inequality which had arisen with respect to the use of names has been eliminated, there is no longer any inequality between the spouses as regards the personal legal effects of marriage.

242. The right to marry and start a family is accorded to men as from the age of 19 and to women as from the age of 16.

243. Kinship and bigamy are regarded as impediments to marriage and render a marriage null and void.

244. The following table shows the number of marriages entered into in Austria:

Year	Number of marriages	Number of marriages per 1 000 inhabitants
1981	47 768	6.3
1982	47 643	6.3
1983	56 171	7.4
1984	45 823	6.1
1985	44 867	5.9
1986	45 821	6.1
1987	76 205	10.1

245. During the same period the number of divorces was as follows:

Year	Divorces	Divorces per 1 000 inhabitants
1981	13 369	1.8
1982	14 298	1.9
1983	14 692	1.9
1984	14 869	2.0
1985	15 460	2.0
1986	14 679	1.9
1987	14 639	1.9

246. On the average, women marry for the first time at the age of 23 or 24. Of every 1,000 women, 29 marry before the age of 20, 109 between the ages of 20 and 25, and 55 between 25 and 30.

247. On the average, men marry for the first time at the age of 26. Of every 1,000 men, 5 marry before the age of 20, 76 between the ages of 20 and 25, and 85 between 25 and 30.

The rights of children (article 24)

248. The first report dealt fully with the legal situation of children. For this reason the following explanations are confined to a few statistical data which may be of interest.

249. In Austria between 86,000 and 87,000 children are born every year. In 1985, the number of live births was 87,440 and in 1987 it fell to 86,503. Of the total number of live babies born, 5 per cent are not of Austrian nationality.

250. Slightly more male babies are born than female babies. In 1986, for every 1,000 girls 1,050 boys were born. In 1987 the corresponding figure for boys was 1,049.

251. The birth rate is currently in decline. In 1971, the rate was 2.2 per cent while the figure for 1987 was only 1.43 per cent.

252. Lastly, it should be mentioned that life expectancy has considerably increased. In 1951, the life expectancy of women was 68 years, while in 1987 women lived to an average age of 78. The trend for men has been similar. In 1951, their life expectancy was 62.5 years whereas by 1987 it had risen to 71.5 years.

Participation in public affairs (article 25)

253. The mechanisms of direct democracy covered by Austrian constitutional law and referred to in the first report have since been expanded. In 1988, a new article 49 (b) was added to the Constitution providing for the holding of referendums. It reads:

> "1. A referendum relating to matters of fundamental importance for the whole of Austria which are within the competence of the Federal legislature shall be held if the National Council so decides on the basis of a request by one of its members or by the Federal Government, this request being prepared in the Standing Commission. Elections or matters within the competence of a court or administrative authority may not be the subject of a referendum;
>
> "2. A request under paragraph 1 shall comprise a motion relating to the question which is the subject of the referendum. The motion shall consist of a question to which the answer is 'yes' or 'no', or it shall contain two motions comprising alternative solutions;
>
> "3. The organization of referendums shall be effected as provided for in articles 45 and 46. The Supreme Electoral Commission shall submit the result of a referendum to the National Council and the Federal Government."

254. Fuller legal provisions relating to referendums were adopted under the Referendums Act of 1989. It should be emphasized that all Austrian citizens entitled to vote in elections of the National Council may participate in a referendum. These persons are all Austrian citizens who have reached the age of 19. As at the time of writing, no referendum has been held.

255. The political parties play a decisive role in the participation of citizens in public affairs. Their legal status was established by the Political Parties Act. By means of a constitutional provision, the following principles were laid down:

> "1. The existence and diversity of the political parties shall be considered as basic elements forming an integral part of the democratic system of the Republic of Austria;
>
> "2. One of the tasks of the political parties shall be to contribute to the formation of the political will;
>
> "3. The founding of political parties shall be free, unless otherwise specified in the Federal Constitution. Their activity may not be the subject of restrictions imposed by specific legal provisions".

256. Because of the general principle of the free formation of political parties, the Republic of Austria has many such parties, political influence nevertheless being restricted to those which are represented in the National Council. These are four in number and also exert decisive influence in the Länder and communes.

257. The freedom to found political parties is restricted by the "prohibition act", which has the rank of constitutional law. This act prohibits the formation of political parties impregnated by the national-socialist ideology. Such parties may not be legally established since they will not be granted legal personality.

258. The Political Parties Act also establishes regulations concerning the financing of parties by the State. The parties represented in the National Council are entitled to subsidies from the Federation for campaign purposes. In 1989, the Federal allocation for this activity was S100 million.

259. The political parties which are not represented in the National Council but put up candidates who received more than 1 per cent of valid votes are entitled, in the year of the election, to subsidies to finance their campaigns.

260. In addition, the political parties represented in the National Council in accordance with the Federal Act relating to the promotion of political organization and journalism are entitled to a subsidy for their civic education. In 1989, budgetary allocations for this purpose were approximately S80 million.

261. As to the right to vote, mention should be made of the Constitutional Court's 1989 ruling that Austrian citizens permanently resident abroad also have the right to vote in elections of the National Council in Austria.

The rights of minorities (article 27)

262. When Austria's first report was considered, a desire was expressed for fuller information on the legal status of the Slovene and Croat minorities. The complete texts of article 7 of the State Treaty of 1955 and the Ethnic Groups Ac of 1976 are accordingly annexed. 1/

263. It should be noted that in 1989 more than S14 million were spent on subsidies to the ethnic minorities provided for in the Ethnic Groups Act. These subsidies will be granted in the light of applications made by ethnic organizations, for example, for cultural centres, folk groups, cultural associations and similar organizations. The Government also subsidizes bilingual kindergartens, the publication of books in the languages of ethnic groups, the purchase, equipment and adaptation of premises intended for events organized by associations, cultural events, etc. The subsidy is also used for the publication of periodicals, the production of textbooks in the languages of the ethnic groups and the organization of cultural events, such as folk-dancing, folk festivals, literary gatherings and so on.

264. The Ethnic Group advisory councils co-operate in determining the use to be made of these subsidies.

1/ These annexes are submitted separately, as reference documents, for the benefit of members of the Human Rights Committee.